

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANNY MCELROY)	
Claimant)	
VS.)	
)	
BUILDERS SQUARE, INC.)	Docket No. 201,637
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the June 22, 2000 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on December 8, 2000.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for claimant. Mark E. Kolich of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an August 3, 1994 accident allegedly resulting in a back injury and major depression. In the June 22, 2000 Award, Judge Benedict found that claimant should receive benefits for a seven and one-half percent permanent partial general disability through January 31, 1997, followed by benefits for a permanent total disability.

Respondent and its insurance carrier contend Judge Benedict erred. They acknowledge that claimant is totally disabled because of major depression but they argue that claimant's depression is caused by genetic and biochemical problems unrelated to the

August 1994 accident or the alleged resulting back injury. Therefore, respondent and its insurance carrier request the Board to reverse the Award.

Conversely, claimant contends the Award should be affirmed.

The only issue before the Board on this review is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On August 3, 1994, claimant fell and injured his back while working for respondent. Following the accident, which occurred in Topeka, Kansas, claimant drove home to Blue Springs, Missouri, where he was admitted into St. Mary's Hospital.
2. For the August 1994 accident, claimant was treated with physical therapy and epidural steroid injections. Claimant now has chronic bilateral L5 radiculopathy as confirmed by EMG along with a soft tissue defect at L5-S1 that is compatible with either a recurrent disc or post-operative scar tissue from an earlier two-level discectomy. Pain management therapy was prescribed but not provided.
3. Claimant made poor recovery from the August 1994 accident. Claimant was released to work limited duties and respondent accommodated claimant by allowing him to bring a sleeping bag and blankets to work which allowed him to lie down as needed. Claimant initially worked two hours per day and eventually increased his workday to four hours per day on an occasional basis. Respondent paid claimant full salary and benefits through approximately January 1997. Following his termination, claimant applied for and began receiving Social Security disability benefits.
4. In December 1998, orthopedic surgeon Dr. Edward J. Prostin examined claimant and diagnosed chronic sprain and strain superimposed upon preexisting degenerative disc disease and fracture. Dr. Prostin determined that claimant had a 25 percent whole body functional impairment due to his failed back syndrome, ten percent of which preexisted the August 1994 accident. The doctor also found that claimant was permanently and totally disabled when considering claimant's physical injuries and psychological distress.
5. Claimant's personal physician, Dr. Keith Eugene Schneider, who last saw claimant in November 1999, testified that claimant had degenerative disc disease and severe chronic back pain. Dr. Schneider believes that claimant is unable to work and, further, the doctor does not understand how claimant is able to perform daily living activities because of the ongoing pain.

6. Claimant also introduced the testimony of clinical psychologist Stanley Butts, Ph.D., who evaluated claimant in January 2000. According to Dr. Butts, claimant has a pain disorder and major depression that is directly related to the August 1994 accident. Dr. Butts also believes that claimant is unable to engage in any substantial or gainful employment.

7. Respondent and its insurance carrier presented the testimonies of orthopedic surgeon Dr. David K. Ebelke and psychiatrist Dr. Patrick L. Hughes. Dr. Ebelke, who evaluated claimant at the request of respondent's insurance carrier, wrote in September 1997 that claimant had chronic low back pain that the doctor suspected was caused by (1) degenerative disc disease at L5-S1, (2) an old failed fusion, (3) post-laminectomy syndrome, (4) L5 spondylolysis, and (5) flat back syndrome secondary to old thoracolumbar junction fractures. But Dr. Ebelke did not find objective evidence that claimant sustained additional injury to his back due to the August 1994 slip and fall. Consequently, the doctor determined that claimant sustained no additional functional impairment from the work-related accident.

8. Dr. Hughes testified that claimant has major depression that has rendered him fully and totally nonfunctional. Similar to Dr. Ebelke's opinion that claimant's physical problems are unrelated to the work-related accident, Dr. Hughes believes claimant's depression is unrelated to his chronic pain or the August 1994 accident. Instead, Dr. Hughes believes claimant's depression is genetically caused by a biochemical illness of the brain.

CONCLUSIONS OF LAW

1. The Award should be affirmed.

2. The Board finds and concludes that claimant sustained personal injury by accident arising out of and in the course of employment with respondent when he slipped and fell on August 3, 1994. The Board finds and concludes that claimant injured and aggravated his back in that accident and developed major depression as a direct result of his injuries. The Board bases that conclusion upon both Doctors Prostic and Butt's testimonies and opinions, which the Board finds credible and the most persuasive.

3. Because claimant continued to work for respondent at full salary through approximately January 1997, claimant is entitled to permanent partial general disability benefits through that date based upon the functional impairment rating.¹ As the parties do not challenge the Judge's finding that claimant sustained a seven and one-half percent whole body functional impairment as a result of the August 1994 accident, the Board affirms that finding and adopts it as its own.

¹ See K.S.A. 44-510e.

4. The Board affirms the Judge's finding that claimant is entitled to receive permanent total disability benefits commencing February 1, 1997. The Board concludes that claimant is unable to engage in substantial and gainful employment in the open labor market and, therefore, satisfied the definition of permanent total disability² after respondent terminated claimant after discontinuing the accommodated job that it was providing.

AWARD

WHEREFORE, the Board affirms the June 22, 2000 Award entered by Judge Benedict.

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS
Mark E. Kolich, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director

² See K.S.A. 44-510c.